

VZCZCXRO2313
RR RUEHBI RUEHCI
DE RUEHNE #1683/01 1701251
ZNR UUUUU ZZH
R 181251Z JUN 08
FM AMEMBASSY NEW DELHI
TO RUEHC/SECSTATE WASHDC 2286
INFO RUEHLM/AMEMBASSY COLOMBO 0896
RUEHKA/AMEMBASSY DHAKA 1259
RUEHIL/AMEMBASSY ISLAMABAD 5004
RUEHKT/AMEMBASSY KATHMANDU 1718
RUEHCG/AMCONSUL CHENNAI 3103
RUEHBI/AMCONSUL MUMBAI 2188
RUEHCI/AMCONSUL KOLKATA 2375
RUCPDO/USDOC WASHDC
RUEHGV/USMISSION GENEVA 7777

UNCLAS SECTION 01 OF 04 NEW DELHI 001683

DEPT FOR EB/IPC- EFELSING/JURBAN AND SA/INS
USDOC FOR 4530/MAC/ANESA/OSA/LDROKER/ASTERN
USDOC FOR 3131/USFCS/OIO/BORR
USDOC FOR KSCHLEGELMILCH
DEPT PASS USPTO
DEPT PASS LOC FOR STEPP
DEPT PASS USTR FOR S. ASIA, AADLER/SMCCOY/TGARDE
GENEVA FOR USTR

SENSITIVE
SIPDIS

E.O. 12958: N/A

TAGS: [KIPR](#) [ETRD](#) [ECON](#) [EINV](#) [IN](#)

SUBJECT: POST RECOMMENDS MODIFIED IPR STRATEGY FOR INDIA

REF: A. STATE 45113, B. NEW DELHI 540

¶1. This cable is sensitive but unclassified. Please treat accordingly.

¶2. Summary: Despite some impressive advancements on certain aspects of intellectual property rights (IPR) and the GOI's continued willingness to engage, India remained on the U.S. Trade Representative's (USTR's) 2008 Special 301 Priority Watch List, having made little progress on the IPR issues identified as most essential to U.S. interests over the preceding year. Post therefore believes it would be worth refining USG strategy for IPR engagement with India. What follows is a series of recommendations, with embedded commentary, that Post feels could greatly strengthen the USG's arguments on IPR. Post wishes to propose a coordinated, interagency program that should, by virtue of inclusive formulation and execution, foster an institutional knowledge and vision of its own. Post believes this will allow the USG to present a cohesive, effective, dynamic case that can survive turnover among U.S. and Indian interlocutors. End summary.

BACKGROUND

¶3. India has made some impressive steps on its patent, trademark, and customs infrastructure and processes in recent years. However, there has been little change in India's IPR policy or legislation since the Patent (Amendment) Act, 2005, and only incremental progress on enforcement. For the past three years, U.S. talking points for India have consistently focused on:

- clarification of the scope of patentability under the 2005 Act;
- consideration of U.S. comments on a draft amendment to the Copyright Act that has been pending for several years;
- implementation of effective data protection for agricultural and pharmaceutical chemicals;
- implementation of the provisions set out in the WIPO Internet Treaties;
- enactment of optical-disk legislation; and
- strengthening of enforcement structure and execution for both police and customs.

¶4. The GOI has generally been happy to engage with the U.S. on IPR, but Indian talking points have been equally consistent, showing

simultaneously a strong interest in convincing the U.S. that India's IPR environment has improved and a disinclination to move purposefully on the issues of greatest U.S. concern. In the last week of February, however, in Ministry of Commerce & Industry (MOCI) Joint Secretary N. N. Prasad's presentation at an IPR conference in Mumbai and in Acting Assistant USTR (AAUSTR) for IP & Creativity Stan McCoy's meetings with a number of officials, GOI rhetoric shifted subtly. The content was much the same as always, with a few illustrative revelations in the meetings, but the GOI drew firmer conclusions: 1. India is now meeting all international obligations; 2. India is a leader on IPR among developing countries; 3. IPR enforcement is progressing at least as well as can be expected; 4. patent- and trademark-application systems are running efficiently, and 5. the IPR environment in India is not discouraging foreign investment. Post believes that the dialogue, long good-natured but repetitive, would benefit from further refinement to the U.S. approach, some ideas for which are described below.

BOLSTER ALL CLAIMS WITH DETAILS OF U.S. INTERESTS ---

15. The U.S. IPR team has repeatedly presented strong arguments on two important fronts, clearly explaining both why certain IPR moves are necessary in principle or with respect to TRIPS (the World Trade Organization's agreement on Trade-related Aspects of Intellectual Property Rights) and, in many cases, how they would benefit India. The discussion of divergent interpretations of what is TRIPS-compliant remains essential, as anything seen as "TRIPS-plus" here is regarded as an unrealistic imposition on a developing country. General discussions of principled policies are also valuable, as they help establish a foundation for specific issues.

NEW DELHI 00001683 002 OF 004

However, the argument on principle and international obligations seems to be less and less persuasive, in itself, as the GOI seems increasingly convinced that its policies are sound. Further, emphasizing the benefits to India and the Indian economy of a strong IPR regime, while valuable and worth continuing, has limited impact in isolation. The GOI knows that U.S. interest in India's IPR regime is not purely altruistic, and gaps in the USG effort to lay out U.S. commercial interests in improved IPR protection--and equally importantly, to demonstrate the damage to U.S. commercial interests under the current IPR regime--allow the GOI to delay action and, in the worst case, dismiss U.S. arguments as meddling in domestic affairs.

16. Post therefore believes that USG officials must be better prepared to address the specifics of America's interest across a broad range of IPR issues when meeting with the GOI. To give one example, in her meeting with AAUSTR McCoy, Information and Broadcasting Secretary Asha Swarup said, essentially, "Why does the U.S. care about our implementing an optical-disk licensing regime or stricter copyright protection for optical media, since almost all piracy is of Indian movies and music?" AAUSTR McCoy provided a sound argument centering on software piracy and the possibility that insufficient protection might act as a deterrent to investment for the American movie and music industries. However, we were not equipped with concrete details on any current piracy in India of American movies or films or on widespread piracy's projected impact on American investment. Similar instances have arisen in a number of contexts, illustrating the need for the U.S. IPR team to be prepared with details of American interest for every issue to be raised in bilateral discussions.

GATHER DATA ---

17. To that end, Post feels the U.S. IPR team--stakeholders in Mission India and in the U.S.--should engage in a renewed effort to collect a range of key data, coordinating with legal and industry organizations in both countries. The IPR team should once again encourage these private players to help bolster U.S. arguments on their behalf by providing concrete, thorough data and giving updates as new data emerge. Where such encouragement fails to yield cooperation, the IPR team should consider insisting that the USG cannot continue to push arguments with the GOI that cannot be

substantiated with real data and examples, as such anecdotal claims, easily argued away by Indian interlocutors, only diminish the strength of the USG's overall effort on IPR in India.

¶18. Some cases where increased data would be useful arise in almost every bilateral interaction on IPR. For instance, the U.S. has long held that the provision for pre-grant opposition is a serious flaw in India's patent law. Joint Secretary Prasad, who serves as the primary GOI point of contact on IPR issues, has responded several times that there have been only a few hundred instances of pre-grant opposition out of the more than 110,000 patent applications filed since 2005 and that, despite repeated MOCI requests, no one has been able to offer an example of frivolous use. Pravin Anand, a prominent IP attorney based in Delhi, tells Post that pre-grant oppositions kill good patents all the time, but we have no concrete data to present. Even the Pharmaceutical Research and Manufacturers of America's (PhRMA) submission for Special 301 was vague on this point. Despite Post's encouragement, companies have proven reluctant to provide specific examples relating to pre-grant opposition directly to the GOI. Post therefore suggests a USG effort to collect data from concerned companies in the U.S. and India and from Anand's and other local firms.

¶19. Prasad has also said trademark applications are now being processed in about 24 months and that the GOI has cleared its backlog of pending trademark applications. Although U.S. companies generally report that trademark applications are indeed being processed within this timeframe, P. K. Modwil, Pfizer's Regional Manager of Global Security for Asia Pacific, says the trademark application for Viagra has been pending for seven years or more. The IPR team should coordinate an effort to collect any like cases

NEW DELHI 00001683 003 OF 004

and document them with the help of stakeholder companies and industry bodies.

¶10. Looking more broadly, Secretary Swarup voiced plainly what seems to be the opinion of many in the GOI, that the IPR environment is not inhibiting foreign investment in India. Dr. Ananda Chakrabarty, a U.S.-based scientist and researcher, offered a potent refutation of this claim in his presentation at February's IPR conference. He said he wants to start a pharmaceutical-manufacturing firm in India based on his research into promiscuous drugs, which can be used to treat several life-threatening diseases simultaneously. However, he feels he cannot safely invest in India because Section 3d of the Patent Act prohibits patents for new uses of existing chemical entities.

¶11. Post believes that our case would be reinforced if USIBC and industry groups would compile a list of other cases that would demonstrate problems in India's IPR regime in pharmaceuticals, software, movies, music, and other sectors and would spell out with direct input from American industry the impact of legislation and piracy on doing business and planning investments would fortify the USG case on many fronts. Additionally, all cases that detail hindrances to investment in pharmaceuticals would help when the two sides discuss IPR protection vis-a-vis public health, a favorite defense for the Indians.

REEVALUATE SPECIAL 301 AND GENERAL PRIORITIES

¶12. The data-gathering effort should be intellectually scrupulous and should not be undertaken with the objective of confirming or invalidating any of the IPR priority issues we have been focusing on in India. Rather, Post feels the IPR team should empirically gather as much relevant information as possible and then take a fresh look at priorities, both generally and with respect to Special 301 as applied to India. Even if the data show USG priorities to be perfectly conceived, Post expects that the mere act of reassessing interests and benchmarks with respect to India will move the dialogue forward with the GOI, which seems to feel the USG is intransigent and fails to recognize realities on the ground.

INTERACT MORE CONSISTENTLY, FREQUENTLY, AND DIRECTLY

¶13. Post recommends that agencies in the U.S. consider convening an India working group of stakeholders that would meet and communicate regularly to coordinate visits, strategy, and information sharing. That working group should, in turn, coordinate actively with Post's IPR Working Group, headed by the U.S. Patent & Trademark Office (USPTO) Attache, via e-mail and quarterly DVCs. One of the strengths of the USG approach has been the capacity to draw on the expertise of the many offices working on aspects of IPR, but without extensive coordination, there is the risk of delivering inconsistent messages and of separate offices getting incomplete or inconsistent information from Indian interlocutors. More systematic coordination among USG representatives in both the U.S. and India would help ensure that all interaction with the GOI is consistent over the long term and that all USG offices in both countries keep abreast of goings-on throughout all stakeholder offices.

¶14. Post suggests that a member of the U.S.-based working group visit India at least quarterly, if possible, and engage in bilateral teleconferences or video conferences between visits, if the progress of issues demands. Engagement should include but extend beyond the Trade Policy Forum's (TPF's) IP Working Group, with counterparts discussing key issues more frequently than strictly necessary for the TPF alone.

¶15. Moreover, each USG visitor should meet broadly with GOI and other Indian stakeholders on each visit, rather than accepting MOCI as an umbrella interlocutor on IPR issues. MOCI is a critical player and should remain an essential part of each visit's agenda, but the need for broader engagement was exemplified twice in AAUSTR McCoy's February meetings. Secretary Swarup explained, despite

NEW DELHI 00001683 004 OF 004

repeated assurances from MOCI that the GOI is close to implementing an optical-disk law, that the inclusion of blank media in the draft remains a fractious issue, that it will take time before a final decision can be made, and that there is no guarantee India will implement an optical-disk law at all. Similarly, while MOCI has consistently asserted that the GOI has carefully considered USG comments on India's draft Copyright Amendment, the new Registrar of Copyrights, Mr. G. R. Raghavendra, informed AAUSTR McCoy that his office was just beginning to evaluate USG input. Broad interaction would allow the IPR team to get the most accurate information available, and more frequent interaction would allow for fluctuating emphasis on various points based on the latest developments and priorities.

FACILITATE PRIVATE ENFORCEMENT EFFORTS

¶16. Post also recommends that USG offices in Washington and India work together to facilitate an organized approach by private-sector players to IPR enforcement. By far the most active private entity in IPR enforcement in India, the Indian Music Industry association (IMI) has orchestrated more than 10,000 raids, including 3,500 last year. Secretary General Savio D'Souza recently expressed IMI's frustration with how little other industries are doing on enforcement and offered IMI's help in conducting raids with the hope of reaping benefits from improvement in the overall IPR environment.

Some other organizations, however, find IMI's work to be wasteful and ineffective, focusing too much on low-level operators and too reliant on rights holders for initiation and legal action. In part because of these differing perspectives, there is limited private-sector action on enforcement. The IPR team should work to facilitate discussion across industries in both the U.S. and India to encourage collaboration and development of best practices. Input from U.S. experts in discussions could greatly inform enforcement efforts.

LEADERSHIP AND LAUNCH

¶17. Post suggests that New Delhi's USPTO Attache and a provisional working-group chair from the U.S. jointly lead the development and implementation of the strategy outlined above. Pos and Washington should arrange a USG-only video conference soon involving all

stakeholder agencies to discuss the ideas laid out herein and any other ideas that any agency might have as to how to improve IPR engagement, work toward a plan of action, and distribute labor related to agreed-upon targets.

¶18. In the absence of Post's USPTO Attache, this cable was cleared by USPTO's India team in Washington.

MULFORD